

[ARGUED DECEMBER 4, 2006. DECIDED JULY 24, 2007.]

No. 06-1078

(consolidated with No. 06-1035)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

**PUBLIC CITIZEN, CITIZENS FOR RELIABLE AND SAFE HIGHWAYS,
PARENTS AGAINST TIRED TRUCKERS, ADVOCATES FOR HIGHWAY AND AUTO SAFETY,
and INTERNATIONAL BROTHERHOOD OF TEAMSTERS,**

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE UNITED STATES,

Respondents,

**AMERICAN TRUCKING ASSOCIATIONS, INC., NASSTRAC, INC., HEALTH & PERSONAL
CARE LOGISTICS CONFERENCE, INC., UNITED PARCEL SERVICE, INC., and THE
NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,**

Intervenors.

**MOTION OF INTERVENOR
AMERICAN TRUCKING ASSOCIATIONS, INC.
FOR A STAY OF THE MANDATE**

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Intervenor American Trucking Associations, Inc. (“ATA”) hereby moves for a stay of the mandate in *Public Citizen, et al. v. Federal Motor Carrier Safety Administration*, No. 06-1078, decided July 24, 2007. ATA requests that the mandate be stayed for an eight-month period, which should provide sufficient time for the Federal Motor Carrier Safety Administration (“FMCSA”) to issue a new final rule in the proceedings on remand.¹

In its decision, the Court partially vacated FMCSA’s 2005 Hours-of-Service (“HOS”) rule, summarizing its conclusions at pages 28-29 of the slip opinion:

For the foregoing reasons, we conclude both that FMCSA failed to provide an opportunity for comment on the methodology of its operator-fatigue model, and that it failed to provide an explanation for the elements of that methodology that Public Citizen disputes. Because the model is the basis for the cost-benefit analysis that led FMCSA to adopt the two provisions of the 2005 Rule that Public Citizen challenged – the increase in the daily driving limit from 10 to 11 hours, and the 34-hour restart provision – we must vacate those provisions. And because those are the only provisions of the 2005 Rule that Public Citizen challenges, we have no occasion to address the balance of its arguments.

A stay of the mandate is needed to prevent serious disruption to trucking operations. The trucking industry and its customers could not instantaneously shift

¹ On August 31, 2007, ATA filed a Petition for Rulemaking, asking FMCSA to issue an immediately-effective interim final rule to retain the 11-hour daily driving limit and the 34-hour restart, and to issue a notice of proposed rulemaking and conduct an expedited rulemaking to address the issues set forth in the Court’s July 24, 2007 decision. ATA proposed a schedule under which a final rule would issue in eight months. The petition appears in the addendum to this brief at Tab A.

to an hours-of-service regime with a different daily driving limit and without the 34-hour restart. Rather, such a conversion would require months of preparation.

As we show below, changes to the daily driving limits and the elimination of the 34-hour restart provision would require retraining drivers and operating personnel, reprinting logs and other forms, and the reprogramming of dispatching and Electronic Onboard Recording (“EOBR”) software in order to assure compliance with the new regulations. In addition, trucking companies would need to adjust operational and dispatching practices, reengineer routes, and address issues with customers, as well as to retain new drivers and purchase new equipment to compensate for the productivity losses resulting from shortened daily driving limits and the elimination of the 34-hour restart. As a practical matter, the extensive compliance and operational changes required to transition to a new HOS regime require months – a fact that surely influenced Congress’ decision to leave the 2003 HOS rules in place pending a new rulemaking following this Court’s 2004 HOS decision.

The immediate vacation of the provisions also would impose substantial transition costs – costs that the industry, its customers, and state law enforcement may have to incur again once FMCSA adopts new HOS rules. In addition, the vacation of these provisions would eliminate the only provisions that offset (to some degree) the productivity losses and the costs imposed on truckers and

shippers by other provisions of the HOS rule, such as the 10-hour mandatory off-duty period, the non-tollable 14-hour work day, and the changes to the sleeper berth requirements.²

Finally, the preservation of the status quo during the pendency of a new FMCSA rulemaking would not compromise driver health or highway safety and would be in the public interest.

Accordingly, as we demonstrate below, the balance of considerations strongly supports a stay of the mandate in this case.

ARGUMENT

This Court has stayed the mandate in other cases, and has issued stays for periods of time comparable to the length of the stay sought here. *See, e.g., Chamber of Commerce of the U.S. v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006); *Spring Corp. v. FCC*, 2003 WL 1877308 (D.C. Cir. Apr. 1, 2003) (five and one-half month stay); *U.S. Telecom Assoc. v. FCC*, 2002 WL 31039663 (D.C. Cir. Sept. 4, 2002); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 872 (D.C.

² Even if motor carriers could instantly transition to a new set of rules, there is significant uncertainty as to what the replacement rules would be. Ordinarily, a vacatur would return the situation to the status quo ante, rendering the matter unregulated or subject to the immediately preceding regulation. Here, the predecessor to the 2005 HOS rules was the 2003 HOS regulation that was vacated by this Court but reinstated on an interim basis by Congress, and that included an 11-hour driving limit and 34-hour restart. *See slip op.* 11. Because FMCSA has not announced what, if any, daily driving limit and restart will be in place during the proceedings on remand, the industry has not been able to prepare for a new HOS regime.

Cir. 2001) (four month stay (*see* 67 Fed. Reg. 44452, 44455 (2002)); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) (four month stay (*see* 65 Fed. Reg. 42937, 42939-40 (2000))); *Independent U.S. Tankers Committee v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987) (six month stay); *Maryland People’s Counsel v. FERC*, 768 F.2d 1354 (D.C. Cir. 1985); *Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 45, 57 (D.C. Cir. 1982) (three and one-half years (*see* 49 Fed. Reg. 21872, 21873-74 (1984); 53 Fed. Reg. 24206, 24207 (1988)).³

In considering a motion for a stay of the mandate, the factors set forth in *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958), and its progeny provide the framework for decision. Thus, as Judge Randolph has explained, the Court should consider “the likelihood that the

³ We recognize that the panel may consider remand-without-vacatur to be the preferable option in cases in which severe disruption may result from the vacation of a rule that could be adequately explained by the agency on remand. *See, e.g., Advocates for Highway & Auto Safety v. Federal Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151-52 (D.C. Cir. 2005); *Northeast Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936, 950 (D.C. Cir. 2004) (per curiam); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). We have sought a stay here because the record on review does not adequately address the disruption that would result from an immediate vacatur, and we believe that a motion for stay affords the best means of supplementing the record on that issue. Because, however, the factors considered by the Court in determining whether to remand without vacatur overlap with those considered on a motion for a stay of the mandate – particularly with regard to disruption likely to result from an immediate vacatur – our showing here would afford the Court ample grounds to grant rehearing on its own motion and amend its July 24th decision to provide for a remand without vacatur.

agency's position will prevail on remand; the likelihood that there will be irreparable harm without the stay; the prospect that others will be harmed if the court grants the stay; and the public interest in granting the stay.” *Honeywell Int’l, Inc. v. EPA*, 374 F.3d 1363, 1375 (D.C. Cir. 2004) (Randolph, J., concurring).

I. THE LIKELIHOOD THAT THE AGENCY’S POSITION WILL PREVAIL SUPPORTS A STAY

There are solid grounds for concluding that the 11-hour daily driving provision and 34-hour restart will survive agency review on remand. Although FMCSA failed to provide an adequate explanation for its adoption of the 11-hour driving and 34-hour restart provisions – and failed to provide adequate notice of aspects of its operator-fatigue model – the Court has not identified any substantive deficiencies in these provisions.

Moreover, the safety experience under these and the other provisions of the HOS rules indicates that the HOS rule as a comprehensive whole has had a very positive impact on highway safety and driver health. *See infra* at 18-19; *see also* Affidavit of David J. Osiecki (“Osiecki Aff.”) ¶¶ 10-15; Declaration of Donald A. Osterberg Aff. ¶ 6-8 (stating that “[i]n almost every category assessed, Schneider Motor Carriers have experienced improved safety performance under the current HOS rules (as compared with 2003, which was the last year in which we operated under the pre-2003 HOS rules)” and noting “significant improvements in safety under the current HOS regulations”); Affidavit of Brian J. Stoddard (“Stoddard

Aff.”) ¶ 6 (providing statistics and stating that “Old Dominion has experienced a significant reduction in its DOT recordable accident . . . rate . . . under the current hours of service regulations”); *id.* at ¶¶ 11, 14; Affidavit of Greer Woodruff (“Woodruff Aff.”) ¶ 4 (providing statistics and stating that “J.B. Hunt has experienced a significant reduction in its DOT recordable accident . . . rate, under the current hours of service regulations first imposed on January 1, 2004” and that “many accident types that could be fatigue related have seen a marked decline”); *id.* at ¶¶ 9, 13; *see also* Declaration of Tom Anderson (“Anderson Dec.”) ¶ 6; Declaration of Bill Bennett (“Bennett Dec.”) ¶¶ 14-15; Affidavit of David Hedgpeth (“Hedgpeth Aff.”) ¶¶ 5, 9, 13; Affidavit of Dean Newell (“Newell Aff.”) ¶¶ 4, 8; Declaration of Ron Uriah (“Uriah Dec.”) ¶ 16-17.⁴

There is no evidence of increased risks of driving in the 11th hour in the real world – which is where the true test of safety occurs. *See* Osiecki Aff. ¶¶ 14-15; *see also* Bennett Dec. ¶ 15 (“In addition, there is no data indicating that fatigue as a result of driving beyond the 10th hour was a factor in any collisions.”): Hedgpeth Aff. ¶ 9 (Frozen Food Express Group experienced no accidents in the 11th hour of driving during the six-month period ending July 31, 2007); Newell Aff. ¶ 8

⁴ The cited affidavits and declarations appear in the addendum in alphabetical order at tabs B through L. Mr. Osiecki of ATA states that the safety experience, as well as the use of the 11-hour driving limit and 34-hour restart, described by these declarants and affiants is representative of the industry. Osiecki Aff. ¶ 31.

(Maverick Transportation LLC experienced no accidents in the 11th hour of driving during June 2007); Stoddard Aff. ¶ 11 (stating that “[d]uring the representative month of June 2007, 1,035 drivers used the 11th hour [a] total of about 9,808 times, resulting in an accident frequency during the 11th hour of .0001 (1 ÷ 9,808 (one one hundredths of a percent))”; Uriah Dec. ¶ 16 (“Pitt Ohio has not seen any adverse safety effects from the use of the 11th hour of driving. Between January 1, 2005 and July 30, 2007, we had six total line-haul accidents. Two of those were directly related to weather conditions. The remaining four occurred before the ninth hour of driving. We have not had any accidents while the driver was operating in the 10th or the 11th hour.”).⁵

Furthermore, an analysis performed by Dr. Laurentius Marais buttresses the conclusion that an 11-hour daily driving limit is likely to be confirmed by FMCSA on remand. For its operator-fatigue model, FMCSA used a database known as “Trucks Involved In Fatal Accidents” (“TIFA”) to estimate the risks of fatigue-related crashes in various hours of driving. *See slip op.* at 17-18. As Dr. Marais shows, FMCSA’s estimate of the increase in the percentage of accidents that are fatigue-related in the 11th hour of driving (as compared to the percentage of such accidents in the 10th hour of driving) was 28.6 percent. Declaration of Dr. M.

⁵ These real-world results support the conclusion that time-on-task is simply not a “strong or consistent predictor of observed fatigue.” Wylie, et al., *Commercial Motor Vehicle Driver Fatigue and Alertness Study*, JA 890, 900.

Laurentius Marais, Ph.D. (“Marais Dec.”) at ¶ 15 n.10. FMCSA concluded that this 28.6 percent increase was more than offset by the benefits of a rule permitting 11 hours of driving (together with a 14-hour non-tollable day and 10 hours mandated daily rest).

The Court held that FMCSA failed to provide a reasoned explanation for its methodology in reaching that conclusion, and, in particular, for grouping the data for Hour 13 and beyond at the 17th hour. *See slip op.* at 23-26. In response to that holding, Dr. Marais has analyzed the TIFA data using more sophisticated statistical methodologies than those used by FMCSA. Dr. Marais’ analyses do *not* involve an aggregation of the data for Hour 13 and beyond. Under these analyses, the actual increases in percentage of fatigue-related accidents from the 10th to the 11th hour were only 18.5 percent under one analysis, and 22.2 percent under another. Marais Dec. ¶ 15 n.10. Thus, FMCSA should surely conclude that this data supports an 11-hour driving limit.⁶

⁶ Public Citizen criticizes FMCSA for deriving a curve from the TIFA data, as a basis for FMCSA’s analysis, rather than relying on the actual data. Public Citizen Br. 49. As Dr. Marais explains, the application of a curve reflected sound statistical practice, given the characteristics of the data. Marais Dec. ¶¶ 6, 8-11. Moreover, “FMCSA’s cubic curve falls well within the margins of error of the TIFA data generally and, in particular, at both 10 and 11 hours of driving. . . . [T]here is no substantial discrepancy between FMCSA’s fitted curve and the raw, underlying data.” *Id.* at ¶ 12. In fact, Dr. Marais’ analysis shows that there is no statistically significant difference between the fatigue-related risk at hours 10 and 11. *Id.* at ¶ 13. With regard to aggregating the data at the 17th hour, as FMCSA did, or the 13th hour, as Public Citizen did in its opening brief (at Appendix A-3),

It also is likely that further analysis will convince FMCSA to retain the 34-hour restart provision. For one thing, cumulative fatigue is not a relevant factor in assessing the safety implications of the restart provision: “The daily 10 hr off-duty period is intended to minimize or eliminate any acute sleep loss. Therefore any cumulative sleep debt that might exist under the current HOS limitations should be minimal or none.” Rosekind, *Managing Safety, Alertness and Performance through Federal Hours of Service Regulations: Opportunities and Challenges* (Mar. 2005) at 24. Thus,

[f]rom a physiological perspective, then, after a 34 hr restart period, a driver would be calculated to have zero sleep loss, acute or cumulative, and be appropriately rested for duty. The subsequent duty hours would be accrued from a rested or ‘zeroed’ sleep loss calculation and added to the following total of work hours. Adding these subsequent work hours retroactively to a ‘weekly’ total, after a recovery period, is misleading and inappropriate. The weekly timeframe is an arbitrary constraint in this physiological context. While the total hours can be calculated to be higher in a ‘week’ by adding retroactively, this ignores the physiological status of a driver that should be rested and ready for duty.

Dr. Marais explains that any such aggregation was unnecessary, but FMCSA’s “curve matches the curves produced by more sophisticated models quite closely over the relevant range of driving hours, in contrast to Petitioners’ illustrated alternative curve” *Id.* at ¶ 6; *see also id.* at ¶¶ 14-15. Public Citizen’s curve, however, “is virtually guaranteed to produce a biased result.” *Id.* at ¶ 6; *see also id.* at ¶¶ 16-17.

Id. at 25. Accordingly, the Court’s concerns about cumulative fatigue resulting from the 34-hour restart (*see slip op.* 26-28) are likely to be adequately addressed by the agency on remand.⁷

A consideration of the costs and benefits of including an 11-hour driving limit and 34-hour restart in HOS regulations also suggests that the provisions will survive review on remand. The elimination of these provisions would omit the principal productivity-enhancing features of the 2005 HOS rule. *Cf., e.g.*, Anderson Dec. ¶¶ 9-20; Bennett Dec. ¶¶ 8, 11; Hedgpeth Aff. ¶¶ 7-8; Osiecki Aff. ¶ 30; Uriah Dec. ¶¶ 14-15, 20-21; Woodruff Aff. ¶ 8. FMCSA recognized that restrictions on the hours drivers are allowed to drive and work reduce productivity. Regulatory Impact Analysis (“RIA”) at 38. The 14-hour non-tollable limitation on daily on-duty time and the 10-hour mandatory daily rest period mandated by the 2005 HOS rule reduce productivity in comparison with the pre-2003 Rule, because they shorten the permissible workday. The principal provisions of the 2005 HOS rule that *increase* productivity are the ones permitting 11 hours of daily driving and the 34-hour restart. As set forth in Section II below, these provisions are not extensively used and do not substantially increase daily or weekly driving hours, but they do add valuable scheduling flexibility, which contributes significantly to

⁷ Further, as noted below, drivers generally are *not* using the 34-hour restart to significantly increase their weekly driving hours.

the productivity gains produced by the 2005 HOS Rule. If these provisions are eliminated, these productivity gains would disappear with them.

The RIA confirms this conclusion. In the RIA, FMCSA compared a number of different HOS options, including “Option 2” – the rule that ultimately was adopted – and “Option 3” – which was similar to the rule that would result from the vacation of the 11-hour daily driving and 34-hour restart provisions. *See* RIA at 3-4 (describing options); *see also* Final Rule, 70 Fed. Reg. at 50045, JA69 (describing Option 2 as “today’s rule”). In comparison to Option 2, Option 3 would result in a loss of productivity of approximately 6.07%, as well as a more than \$2.1 *billion* increase in total annual incremental costs for the long-haul trucking industry and the need to hire more than 106,000 more drivers to offset productivity losses. RIA at ES-4. In fact, Option 3 “could eliminate net income in the short term for some industry size categories.” RIA at ES-8.⁸

Given the positive safety experience under the 2003 and 2005 HOS rules, the agency is not likely to impose billions of dollars of extra costs on motor carriers and their customers to obtain little or no improvement in overall safety.

⁸ In addition, a sensitivity analysis was performed that tested a variant of Option 2 that included a 10-hour driving limit. This variation was found to be far less cost-effective than the 11-hour (current rule) version of Option 2, even when the value of each statistical life saved was tripled and even when the relative risk of a fatigue-related crash in the 11th hour of driving was raised by 1.4 times the value used in the time-on-task multiplier in the RIA. 70 Fed. Reg. at 50046, JA70.

Indeed, to choose otherwise would be to ignore the requirements that FMCSA consider costs and benefits, as well as safety, in promulgating HOS rules. *See* 49 U.S.C. § 31136(a) & (c)(2)(A). Thus, the first stay factor supports a stay.

II. TRUCKERS AND THEIR CUSTOMERS WILL SUSTAIN IRREPARABLE HARM IF THE STAY IS NOT GRANTED

If the stay is not granted – and a new daily driving limit immediately goes into effect and the 34-hour restart is immediately eliminated – the trucking industry will face serious disruptions. Truckers and their customers cannot instantly transition to an HOS regime without the 11-hour daily driving provision and the 34-hour restart. Rather, a reasonable transition would be needed.

As ATA has recently explained in its petition for rulemaking, “[a]s a practical matter, it is simply impossible for the trucking industry and its customers to instantly transition from HOS rules that have governed trucking operations in this country to new HOS rules.” August 31 Petition for Rulemaking at 2 (footnote omitted). An immediate elimination of the 11-hour daily driving limit and 34-hour restart would require the trucking industry and law enforcement,

virtually overnight, to make a myriad of changes. The elimination of the 11-hour driving limit and 34-hour restart provision will require changes to dispatch, scheduling, and routing arrangements; revisions of policies, procedures, and training manuals; retraining of drivers and dispatch and administrative personnel; alterations in electronic onboard data recording and scheduling software; and, in many cases, the hiring of new drivers and purchase of new equipment. As FMCSA and the United States Congress ha[ve] previously recognized, none of these steps can happen without a

reasonable transition period. Moreover, these changes, which would be quite costly, may have to be repeated again when FMCSA adopts a new final rule in response to the D.C. Circuit decision.

Id. at 2-3 (footnote omitted). The declarations and affidavits attached to this motion confirm ATA’s analysis.

A. Operational Issues

With regard to the 11-hour daily driving limit, many carriers – especially less-than-truckload (“LTL”) carriers – have integrated this provision into their operating schedules and operational and routing practices. See Bennett Dec. ¶¶ 6, 10; Hedgpeth Aff. ¶ 7; Newell Aff. ¶ 6; Osiecki Aff. ¶¶ 18-23, 31; Stoddard Aff. ¶¶ 5, 8; Uriah Dec. ¶¶ 8-13; Woodruff Aff. ¶ 6. For instance, as Mr. Stoddard explains, the availability of the 11th hour of driving

has allowed Old Dominion to expand significantly (by about 40%) what we refer to as meet and turn operations. Drivers from Service Centers within 11 hours driving time, meet half way and exchange trailers bound for the other Service Center. That practice allows the drivers to return home each day rather than stay at the trailer’s destination Service Center. This allows the drivers to take their 10 hours off duty at home and stay on predictable work/sleep cycles. Similarly, the availability of the 11th hour has allowed Old Dominion to engineer certain multiple destination routes so as to allow a driver to return to his home base each day within the allotted 11 hours of driving.

Stoddard Aff. ¶ 8; *see also, e.g.*, Uriah Dec. ¶ 10 (“The 11th hour enables Pitt Ohio to use a relay and turn system, whereby road drivers return home every evening.”); Woodruff Aff. ¶ 6.

Moreover, even when not extensively used, the 11-hour driving limit provides flexibility for scheduling purposes and to deal with traffic congestion and delays, extra wait times at loading docks, unexpected delays in making deliveries, and difficulties in finding driver rest facilities. *See* Woodruff Aff. ¶ 5; Bennett Dec. ¶¶ 6, 9; Newell Aff. ¶ 5; Osiecki Aff. ¶¶ 16-17, 31; Stoddard Aff. ¶ 7.

The elimination of the 11th hour of driving would require companies that have integrated the provision into their scheduling and operational practices “to undertake a massive reengineering effort to reschedule its operations and line haul routings” – an effort that, for instance, would require Old Dominion to expend “more than 3,000 hours.” Stoddard Aff. ¶ 9; *see also* Uriah Dec. ¶¶ 18-19. To compensate for the loss of driver productivity, companies would need to hire additional drivers and purchase additional equipment. *See* Anderson Dec. ¶ 20; Bennett Dec. ¶ 8; Hedgpeth Aff. ¶¶ 7-8; Woodruff Aff. ¶ 8.

In addition, the loss of an hour a day of permitted driving time would reduce drivers’ income, thereby increasing driver turnover, which also would require the hiring of additional drivers. *See* Woodruff Aff. ¶ 8; *see also* Anderson Dec. ¶¶ 10-14; Stoddard Aff. ¶ 10. For LTL drivers, it also would result in many more nights spent away from home. *See* Stoddard Aff. ¶ 8; Uriah Dec. ¶¶ 13-14; Woodruff Aff. ¶ 6. This, too, would reduce driver satisfaction, increasing turnover.

Many of the same points apply to the 34-hour restart. It, too, has provided great benefits. As Mr. Woodruff explains, although the 34-hour restart is not used extensively (and certainly is not being used to substantially inflate drivers' average hours of work), it provides flexibility for a number of operational purposes. Woodruff Aff. ¶ 10 (noting that an “[a]nalysis of driver logs for June 2007 showed that drivers that used the 34 hour restart [to] gain on average an additional 4.1 hours of work time per 8 day period,” and that “the 34-hour restart is not being used to significantly inflate weekly driving hours, but rather for a variety of other operational purposes”); *see also* Hedgpeth Aff. ¶ 10 (rather than being used to substantially increase weekly driving hours, the 34-hour restart has been used for such operational purposes as allowing drivers facing a significant delay in getting the next load to take time off “to allow more hours later in the week when he may need them”); Osiecki Aff. ¶¶ 24-27 (data shared with ATA shows that the 34-hour restart is not being used to substantially increase driving hours, but rather to address inefficiencies and logistical issues and problems). The restart also provides flexibility for dealing with weather-induced work delays. Statement of George Caine (“Caine Statement”) ¶¶ 8-9.

The 34-hour restart also has enhanced the quality of life for drivers, giving them flexibility to use down time without incurring financial penalties, to attend to personal matters, and to arrange more time at home. *See* Hedgpeth Aff. ¶ 11

(drivers can use 34-hour restart “while waiting on a load instead of wasting available driving hours” and to “take mid week breaks to attend to personal matters without a financial penalty” and “organize their schedules so as to be home more frequently, extending off duty times”); Newell Aff. ¶ 9; Osiecki Aff. ¶ 25 (“Indeed, almost any time a driver takes a day off, he can be expected to extend it another 10 hours (which usually involves a second sleep period) so that he can start work again with a fresh set of weekly hours.”); Stoddard Dec. ¶¶ 12-13. In addition, because the 34-hour restart greatly simplifies the determination of when a driver may return to service after a week of driving, drivers may be relying on the provision even when they take more than the 34 hours of rest allowed under the provision. *See* Hedgpeth Aff. ¶ 10 (34-hour restart “simplifies log keeping with respect to the weekly limits”); Osiecki Aff. ¶ 25.

The elimination of the 34-hour restart would require motor carriers to hire additional drivers and purchase additional equipment to offset productivity losses. Anderson Dec. ¶ 20; Caine Dec. ¶¶ 10-12; Stoddard Aff. ¶ 12; Woodruff Aff. ¶ 11. It also would increase stress and reduce the quality of life for drivers.

B. Compliance Issues

The elimination of these provisions would necessitate not only the major (and costly) operational changes outlined above but also a variety of compliance-related steps requiring substantial expenditures and time to complete. The current

HOS rules have been in effect for four years, and many drivers and enforcement personnel undoubtedly have never worked under different HOS regulations.

Regardless of their drivers' experience, companies would need to retrain drivers, dispatchers, and other administrative personnel; revise and print training and compliance materials; and rewrite HOS monitoring and auditing software.

Anderson Dec. ¶ 21; Bennett Dec. ¶¶ 12-13; Hedgpeth Aff. ¶¶ 14-18; Newell Aff. ¶ 10; Stoddard Aff. ¶ 15; Uriah Dec. ¶¶ 22-25; Woodruff Aff. ¶¶ 14-18.

In addition, the design, testing, and roll-out of new software for EOBRs will take four to six months. Declaration of Brian McLaughlin ¶¶ 6-8.

* * * *

These operational and compliance-related changes would take considerable time and impose great costs. *See, e.g.* Osiecki Aff. ¶¶ 28-29. Indeed, Mr. Stoddard estimates that his company would need four to six months for such a transition. Stoddard Aff. ¶ 16. Similarly, based upon prior experience, affiants Hedgpeth and Woodruff estimate that their respective companies would need six months to make the substantial changes needed for a proper transition. Hedgpeth Aff. ¶ 19; Woodruff Aff. ¶ 19.

Moreover, the unrecoverable costs of a transition may have to be borne by the industry once in response to the Court's decision and *again* when FMCSA adopts a new rule. *See* August 31 Petition for Rulemaking at 3. And, if FMCSA

ultimately adopts an 11-hour daily driving limit and a restart, companies that hired new drivers and purchased new trucks could face overcapacity issues. Caine Dec. ¶ 10; Uriah Dec. ¶ 20-21.

Thus, the industry and its customers would suffer irreparable harm if the mandate is not stayed.⁹

III. THE STAY WILL NOT HARM OTHERS

As noted in Section I, *supra*, safety has improved under the current HOS rules. ATA demonstrated this in its August 31 Petition for Rulemaking:

Since January 2004—the effective date of the revised HOS rules containing the 11 and 34 hour provisions—the trucking industry has operated more safely than anytime in its history. The National Highway Traffic Safety Administration, supplemented by FMCSA, recently released crash data demonstrating that truck-involved fatalities decreased 4.7% in 2006 over 2005, the largest percentage drop in truck-involved fatalities since 1992. The truck-involved fatality rate for 2006 stands at 2.25 fatalities per 100 million vehicle miles of travel (VMT)—the lowest rate since the U.S. Department of Transportation began keeping these records in 1975. The number

⁹ The principle that economic injuries generally are not sufficient for establishing irreparable harm does not apply here, because the industry’s economic losses – as well as the loss of goodwill – would not be recoverable. Thus, the showing here establishes irreparable harm. *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (“We are mindful of the precedents that declare that ‘economic loss does not, in and of itself, constitute irreparable harm’ [This proposition], however, rest[s] on the assumption that the economic losses are recoverable. The threat of unrecoverable economic loss, however, does qualify as irreparable harm.”) (citations omitted); *cf. Va. Petroleum Jobbers*, 259 F.2d at 925 (“The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”).

of injuries resulting from truck-involved crashes decreased by almost 2,000 in 2005 and dropped another 1,000 in 2006.

August 31 Petition for Rulemaking at 3 (footnote omitted); *see also* Osterberg Dec.

¶¶ 6-8 (Schneider Motor Carriers' safety performance under current rules).

Moreover, drivers have benefited not only from the flexibility and reduced stress afforded by the 11-hour driving and 34-hour restart provisions (as noted above), but also from the increase in overall safety provided by the HOS rules. Thus, as ATA noted in its petition, statistics compiled by the Department of Labor's Bureau of Labor Statistics show that truck driver non-fatal incidence rates of occupational injuries and illnesses under the current HOS rules have dropped more than 10 percent as compared to the two-year period prior to the implementation of the current rules. *Id.*

For the foregoing reasons, a stay will not harm drivers or the public.

IV. THE PUBLIC INTEREST SUPPORTS A STAY

The trucking industry is a large and vital participant in the U.S. economy. *See* Osiecki Aff. ¶ 7. Because an immediate termination of the 11-hour driving limit and 34-hour restart would result in severe dislocation to this industry, the public interest clearly supports a stay.

In addition, as shown above, the retention of the existing provisions of the HOS rules would not impair highway safety or driver health. Indeed, a rapid transition to new procedures, routings, and schedules, as well as the need to hire

additional drivers, could have deleterious safety consequences. *See* Hedgpeth Aff. ¶ 7 (“FFEG’s experience shows that drivers in their first year of driving are about 3 times more likely than a veteran driver to be involved in an accident”); Woodruff Aff. ¶ 6.

Furthermore, the immediate elimination of these provisions could result in “a patchwork of enforcement obligations among the 50 states which will result in a substantial disruption in the enforcement of the HOS requirements.” August 31 Petition for Rulemaking at 3 (footnotes omitted); *see also* Osiecki Aff. ¶ 31. This would create serious problems both for the states, which are the primary enforcement authorities for the HOS regulations, as well as for interstate truckers.

The public interest, therefore, also supports a stay.

CONCLUSION

For the foregoing reasons, ATA’s motion for a stay of the mandate for a period of eight months should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 6th day September, 2007, I served copies of the foregoing Motion for a Stay of the Mandate by e-mail and overnight delivery on Petitioners, Respondents, and *amici* herein at the following addresses:

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